

[COURT OF CRIMINAL APPEAL]

1966 *Present* : Sansoni, C.J. (President), H. N. G. Fernando, S.P.J.,
and Abeyesundere, J.

THE QUEEN *v.* G. SETHAN

APPEAL No. 56 OF 1966, WITH APPLICATION No. 96

S. C. 124—M. C. Ratnapura, 4996

Trial before Supreme Court—Words used in an unusual sense—Duty of Jury to determine meaning thereof—Summing-up—Duty of Judge to refer to evidence favourable to the accused—Criminal Procedure Code, s. 245 (b).

In a trial for murder, E, who was one of the two prosecution witnesses, testified that the accused had used the word "budhikarala" in respect of what he had done to the deceased and that the word, as understood in their circles if not everywhere, meant that the accused had "killed" the deceased. This was E's interpretation of the expression "budhikarala", but, in the summing-up of the Judge, it was put to the Jury as the only possible interpretation of that expression, although the evidence of the other prosecution witness and the accused was in conflict with that of E as to whether the deceased was "killed" or only "stabbed" by the accused.

Held, that it was the duty of the Judge, under section 245 (b) of the Criminal Procedure Code, to have left it to the Jury to determine the meaning of the word "budhikarala" which was used in an unusual sense.

Held further, that it was the duty of the Judge to have put the case for the defence fairly and adequately to the Jury in his summing-up. He should have referred not only to the evidence adverse to the accused but also, adequately, to the evidence favourable to him.

APPPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *G. C. Wanigasekera* and *Miss Adela P. Abeyratne* (Assigned), for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 14, 1966. SANSONI, C.J.—

The accused was convicted of murder by a 6 to 1 verdict, on an indictment which charged him with having on or about the 19th August 1964, with another, committed the murder of one Mudiyanse.

It was common ground that on the evening of that day the accused, Mudiyanse and one Heenmahathmaya drank pot arrack in the house of Heenmahathmaya from about 5.30 p.m. At about 6.30 p.m. the accused and Mudiyanse left Heenmahathmaya's house, and went walking together towards their respective houses. The next day Mudiyanse's dead body was found on the threshing floor of a paddy field called Halgahakumbura.

The medical evidence pointed to the deceased having received 5 incised wounds on various parts of his body, none of which were grievous. There were also what the Doctor described as 17 gun shot entrance wounds in the front of his chest and 3 exit wounds in his back. No pellets were found in the body, nor was any wadding found at the spot. The Doctor's opinion that they were gun shot injuries was based on the appearance and distribution of those entrance and exit wounds. When it was suggested to him by Crown Counsel that they could have been caused with a sharp pointed weapon like a spoke, or by a cylindrical weapon, he said that it was possible. The body was in an advanced state of putrefaction and that may have caused difficulty in diagnosing the exact nature of the weapon used.

The accused gave evidence. He said that while he and the deceased were walking home together from Heenmahathmaya's house on the evening in question, after they had drunk a lot of pot arrack, they came to Halgahakumbura. There the deceased took a knife into his hand and stabbed him. He held up his hand and received a cut injury. The deceased stabbed him again, and when he tried to stab him a third time he took a knife from his waist and stabbed the deceased three times. The deceased retreated, and he got frightened and ran away. He said more than once that the deceased had not fallen down or died although he appeared to be becoming lifeless. From the threshing floor, the accused said he went to the house of one Emanis and called him out. He also went to the house of one Podimahathmaya and fetched him. The three of them then walked to the accused's house. The accused said that on the way he told them that at Halgahakumbura Mudiyanse stabbed him with a knife, and fearing that he would be killed he stabbed Mudiyanse. He also told Pabilis, another friend of his, the same thing.

The accused's position throughout his evidence was that when he left the threshing floor he thought Mudiyanse was still alive, although injured. But Emanis' evidence was to the effect that on the night in question the accused came to his house and told him that at Halgahakumbura threshing floor he stabbed Mudiyanse with a knife, the words used being "Halgahakumbura kamathadi Mudiyanseta pihiyen anala budhikaralamai ave". Emanis also said "When a person is killed in that village it is said 'budhikarala'." In answer to Court he said the word used was not "bawala" which means "to lay low", but "budhikarala" which means "to kill". Pabilis, however, said that the accused only told him that he had come after stabbing Mudiyanse with a knife,

and that he was left at Halgahakumbura threshing floor. Since much turns in this case on the expression said to have been used by the accused to Emanis, it should be remembered that the accused denied that he told Emanis that he used the words "Budhi karala awa".

Thus at the close of the evidence, there was on the one hand the evidence of Pabilis and the accused which only referred to the stabbing of the deceased by the accused; and on the other hand, there was the evidence of Emanis that the accused had used the word "budhikarala" in respect of what he had done to the deceased.

The chief complaint made against the learned Commissioner's summing-up in this case is that on several occasions, in fact whenever he referred to Emanis' evidence, he instructed the Jury that the accused told Emanis that he had stabbed and killed the deceased. For instance, he said this, and there are other similar passages: "The important point is, Emanis says that the accused when asked by them 'why all this' said, 'I have stabbed Mudiyanse with a knife and I have put him to sleep—mammia Mudiyanseta pihiyen anala budhikarala thamai ave'. And, you will remember, that the witness himself explained that by that term 'I have put him to sleep' literally in the English, as understood in the Sinhalese, certainly in their circles if not everywhere, that the man had been killed. In other words, 'I have stabbed and killed Mudiyanse' that is what it means."

Mr. Coomaraswamy said that when the learned Commissioner on about ten occasions told the Jury that the accused had informed Emanis that he stabbed and killed the deceased, he left them with no option but to hold that the words used meant that the accused stabbed and killed Mudiyanse. This was Emanis' interpretation of the expression "budhikarala", but it was put to the Jury as the only possible interpretation of that expression.

Under section 245 (b) of the Criminal Procedure Code it is the duty of the Jury to determine the meaning of the words used in an unusual sense, but the Commissioner never left it to the Jury to determine what that expression meant.

When the Commissioner was dealing with the accused's evidence he said "He (the accused) was at pains to make it quite clear that at the time he left the scene of the incident, Mudiyanse was still alive and standing How is it then, having set out from that place, he goes and tells Emanis 'I have stabbed and killed him?' The point again, Gentlemen, is if the accused had used the gun, why did accused want to hide that and take the credit on himself that he stabbed and killed?" It is quite clear that the Jury were told to put one and only one interpretation on what the accused is said to have told Emanis, as if no other interpretation was possible.

Moreover, in this passage, and elsewhere, the accused's evidence is put to the Jury as being false. They were not asked to consider whether Emanis may not have been lying rather than the accused. Time and again in the summing-up, even when the accused's defence was being dealt with, it was put to the Jury that the accused came to Emanis and said that he had killed the man. Pabilis's evidence as to what the accused told him was not given anything like the same attention, and this would have gravely prejudiced the accused, for Pabilis's version was favourable to the accused. The Jury were therefore not given the opportunity to consider fairly the defence put forward. The summing-up proceeds throughout on the basis that the accused did utter the words which Emanis says he uttered, and they bore only one meaning. Even when it came to the question of the Jury deciding what the accused's intention was when he inflicted the injuries on the deceased, they were told that they could take into account that the accused said "I have killed him with a knife and come".

We have considered the summing-up carefully, and we have come to the conclusion that the case for the defence was not adequately or properly put to the Jury. We therefore quash the conviction and acquit the accused.

Accused acquitted.